

The Regulation of Corporate Ethics: Governance in an Age of Inquiries

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DEODAND AND FRANKPLEDGES: DO THE MEDIEVAL ANTECEDENTS OF CORPORATE LIABILITY OFFER ANY INSIGHTS TODAY?

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Thank you to the organisers of this conference. On behalf of the ALRC, we are proud to partner with the University of Qld's Law and Business School for today's event. The ALRC would be very happy if we did in fact live in an age of inquiries because that is what we do – we conduct inquiries into the law at the request of the government.

Relevant to today's proceedings, in April 2019, we were tasked with reviewing corporate criminal liability under Commonwealth law. Specifically, we have been asked to look at the way in which corporations are subject to the criminal law. A central concern is when and in what circumstances should the corporation, as distinct from its directors, officers and employees, be liable to criminal sanction. This necessitates an examination of the threshold question: Should we apply the criminal law to corporations? And to that question, given we are early in our inquiry, I want to respond not with an answer per se but more questions.

Today, I want to take a slightly theoretical approach. In the seminal case of *Saloman v A Saloman & Co Ltd*, Lord Macnaghten held that once it has been incorporated, a company "is at law a different person altogether" from its shareholders.¹ That case firmly established the cardinal principle of corporate law that a company is a separate legal individual. Modern legislation such as the *Corporations Act 2001* (Cth) affirms that a corporation has all the legal powers and responsibilities of a natural person.² While there are clear commercial and economic benefits as a result of the creation of the corporation, the construction of a legal artifice of 'the legal person' raises fundamental questions about the applicability of the criminal law to that artifice.³ A corporation cannot be sent to jail. It has no soul that may be damned.

Having created the legal person, when it comes to crimes, the law has focused on two key technical questions:

- When or in what circumstances will the actions of a human be attributable to the corporation?
and

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¹ *Saloman v A Saloman & Co Ltd* [1897] AC 22, 51.

² *Corporations Act 2001* (Cth) s 124.

³ Hon TF Bathurst, 'The Historical Development of Corporations Law' (2013) 37 *Australian Bar Review* 217, 225.

- How will those individuals' actions be attributable? What is the legal test?

Lord Reid in *Tesco Supermarkets Ltd v Natrass*⁴ spoke of how a corporation could act only through its agents, and so the question was to identify who was the “directing mind and will” of the corporation. But if a corporation is treated in law as a separate individual, is this the most appropriate approach to ascribing corporate criminal liability? To draw an analogy having decided that a bus is a legal person in its own right, when it comes to criminal law, the law focuses on the bus driver's actions and thoughts to determine the bus' culpability.

Chief Justice Bathurst, in a lecture to the Forbes Society, has traced how the modern corporation evolved out of medieval corporations, merchant guilds, and societies, into the trading companies of the seventeenth century and then into the joint stock company.⁵ Rather than looking at the history of the corporate *form* itself, today I will consider some medieval antecedents of corporate liability.⁶ These are the principles of *deodand* and *frankpledge*. I will suggest that these concepts give us some insights into how we conceptualise the utility or otherwise of attaching criminal liability of corporations

Medieval Analogues?

Let me explain what *deodand* and *frankpledge* were.

The *deodand* has been described as a “strange and seemingly irrational principle”⁷ that came into the common law in the 11th century and continued in existence until 1846.⁸ Under the law of *deodand*, an animal or object that caused the death of a human was forfeited to the Crown.⁹ Under this law, the jury in a coronial inquest had the power to decide whether a chattel had caused the death and thus find that the chattel was a *deodand*.¹⁰ Thus if the wheel of a horse cart came loose and struck and killed a pedestrian that wheel could be forfeited as a *deodand*. The focus was on the object rather than the driver of the cart, the person who made the cart or the person responsible for the upkeep of the cart.

The *frankpledge*, on the other hand, was a mechanism for keeping the peace in medieval England in a time that pre-dates police forces.¹¹ And it is mechanism that is probably incompatible with the Geneva conventions as it involves collective punishment. Under this system, groups of ten men, and it was men in those days, “were bound together and held responsible for delivering anyone in any of

⁴ *Tesco Supermarkets Ltd v Natrass* [1972] AC 153.

⁵ Bathurst (n 3) 218–225.

⁶ Analysing the work of Professor Albert W Alschuler who has put forward the *deodand* and *frankpledge* as two different ways of thinking about corporate criminal responsibility: Albert W Alschuler, ‘Two Ways to Think about the Punishment of Corporations’ (2009) 46(4) *American Criminal Law Review* 1359.

⁷ JH Baker, *An Introduction to English Legal History* (Oxford University Press, 4th ed, 2005) 387.

⁸ Anna Pervukhin, ‘Deodands: A Study in the Creation of Common Law Rules’ (2005) 47(3) *The American Journal of Legal History* 237, 237 (‘Deodands’).

⁹ Alschuler (n 7) 1360–1361; Pervukhin (n 9) 242; JH Baker (n 8) 387.

¹⁰ *Ibid* 237.

¹¹ Anne Kerr and Wright, Edward (eds), *A Dictionary of World History* (Oxford University Press, 3rd ed, 2015).

their ten households who had committed a crime”.¹² You would want to choose your neighbours wisely. All of the men were held responsible and punished if a criminal absconded from their custody.¹³ Frankpledge has been described, variously, as a form of suretyship¹⁴ and as a “form of collective responsibility for good conduct”.¹⁵ It kept the peace by attaching responsibility to the collective, making the collective effectively self-policing.

Professor Albert Alschuler of the University of Chicago has suggested that there are two explanations for corporate criminal responsibility. One of these treats the company as a *deodand* and the other treats it as a *frankpledge*. The company itself is to be punished, or the criminal liability of the company is merely a device for the liability of members of the collective of natural persons responsible for it. He criticises corporate criminal responsibility as being founded on the same “mythology” as the medieval deodand.¹⁶ It is as if we smiting a wheel for causing injury by convicting a corporation.

Before I return to consider those analogies, it might be helpful to consider some of the contemporary theories that underlie corporate criminal responsibility.

Models of Corporate Criminal Responsibility

There are two key theoretical approaches to corporate criminal responsibility which are in tension with each other. The first is the traditional or *nominalist* view, reflected in *Tesco* that a corporation cannot act and be liable for criminal acts as a separate entity from its controllers or agents.¹⁷ Conversely, the *realist* theory accepts the legal fiction of corporate personality as true and holds that a corporation may exist, and indeed commit crimes, as a separate entity and in a manner independent of the responsibility of a particular natural person.¹⁸

These two theories explain the different approaches to attributing liability to corporations that developed over the course of the twentieth century. The traditional view can be seen in two distinct approaches. First, *vicarious liability*, which is the position for corporate criminal responsibility in the United States.¹⁹ Vicarious liability ascribes to a company the physical and mental elements of conduct undertaken by one of its employees or agents.²⁰ Secondly, there is the *identification doctrine*. This is the approach taken in *Tesco* and subsequently refined in *Meridian* in the 1990s.²¹ In its early form, the

¹² Alschuler (n 7) 1361–1362.

¹³ Ibid 1362.

¹⁴ William Alfred Morris, *The Frankpledge System* (Longmans, 1910) 69.

¹⁵ John Cannon and John Crowcroft (eds), *A Dictionary of British History* (Oxford University Press, 2015).

¹⁶ Alschuler (n 7) 1380.

¹⁷ Eric Colvin, ‘Corporate Personality and Corporate Crime’ (1995) 6(1) *Criminal Law Forum* 1, 1.

¹⁸ Ibid 2; Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 5.

¹⁹ Olivia Dixon, ‘Corporate Criminal Liability: The Influence of Corporate Culture’ (Sydney Law School Legal Studies Research Paper No 17/14, University of Sydney, February 2017) 4.

²⁰ Ibid 2.

²¹ *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, 3 All ER 918,.

corporation was held criminally liable for the conduct of its key employees acting within the scope of their employment. Following *Meridian*, the test has become broader and more flexible, asking which, as a matter of statutory construction, persons' states of mind should be attributed to the corporation.

So that is the traditionalist view or approach. Around a similar time as *Meridian*, the realist theory began to coalesce into a coherent view of attributing liability to a corporation. It has been described as a *holistic* model of liability,²² or as one providing for "organisational" liability.²³ A *holistic* model was adopted in our Commonwealth *Criminal Code*, which enables criminal fault to be attributed to the corporation on the basis of a deficient corporate culture. Such an approach "recognises that through its permissive culture or lack of internal policies, it can meaningfully be said that the company itself is guilty" of the offence.²⁴ In so doing it recognises "the corporateness of corporate action and personality" in a way that more traditionalist approach can't do because they focus on the individual's actions as the basis of corporate liability.²⁵

Now, the realist model might be thought to turn a delinquent corporation into something like a deodand, with the company being punished for its own supposed independent wrong. However, the point of holistic liability has been justified as a means of improving internal systems, values and corporate of compliance.²⁶ - the frankpledge. The greater insight these antecedent concepts can give us however is not about the particular attribution model we use for imposing criminal responsibility on a corporation. Rather, they allow us to interrogate a more basic question – for what purpose might we want to prosecute a corporation itself, rather than its directors or officers?

Should we be using corporate criminal responsibility as a deodand or a frankpledge?

In contemporary corporate law enforcement, criminal sanctions are theorised as sitting at the top of an "enforcement pyramid", with civil penalty proceedings in the middle and administrative measures such as infringement notices at the bottom. The theory is that criminal proceedings should be reserved for the most serious contraventions.²⁷ However, with the existence of civil penalty proceedings, one does have to ask what is the utility of criminal responsibility of a corporation. Several justifications can be put forward.

²² Dixon (n 22) 4.

²³ Ross Grantham, 'Attributing Responsibility to Corporate Entities: A Doctrinal Approach' (2001) 19 *Corporations and Securities Law Journal* 13, 172.

²⁴ Ibid.

²⁵ Brent Fisse and John Braithwaite, 'The Allocation Of Responsibility For Corporate Crime: Individualism, Collectivism And Accountability' (1988) 11 *Sydney Law Review* 468, 475–476.

²⁶ See Fisse and Braithwaite (n 28).

²⁷ *Morley v Australian Securities and Investments Commission (No 2)* [2011] NSWCA 110 [692].

First, reflecting the holistic model of responsibility, there is the idea that there are certain wrongs that are committed by the company as an entity,²⁸ such as those arising from a deficient corporate culture, and these are something it makes sense to prosecute the company itself for. However, much of the theory on this model of responsibility suggests that its purpose is to motivate the company to deploy its own internal compliance processes.²⁹ Thus, while appearing to be a deodand, prosecution of the company is really acting as a frankpledge encouraging internal monitoring and compliance between those operating the company.

Secondly, and relatedly, there is the argument that corporate criminal responsibility exists merely to act as a deterrent for wrongdoing by a company. Once again, this seems to be using corporate responsibility as a frankpledge – to motivate better conduct by those involved in the management of the company. The problem with this justification is that it struggles to provide an independent justification for corporate criminal liability that differentiates it from civil penalty liability, particularly when it is not possible to imprison a corporation. As the plurality of the High Court stated in 2015, “...whereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty, is primarily if not wholly protective in promoting the public interest in compliance.”³⁰ If the responsibility of a corporation is to serve as a modern frankpledge that promotes the monitoring of corporate behaviour by a director or officer, one can question why the corporation can be liable for a breach of the criminal law. The better approach may be to impose a civil penalty on the corporation and, where appropriate, pursue individual wrongdoers criminally where the appropriate level of culpability exists.

There is a further related issue that is relevant. That is the much broader question of what conduct should, in fact, be criminal. Criminal law has pluralist aims – retribution, denunciation, rehabilitation and deterrence. Being found guilty of a criminal offence also attaches significant stigma.³¹ It is meant to reflect societal denunciation because of one’s criminal conduct.³² Consequently, there has been some academic criticism of the growth in recent decades of the volume of criminal offences in existence, as the criminal law expands to capture regulatory offending.³³ To demonstrate that volume, as my colleague Venetia will go into in more detail later in today’s proceedings, we mapped 15 pieces of legislation and identified over 2300 criminal offences.

²⁸ See, eg. Pamela H Bucy, ‘Corporate Ethos: A Standard for Imposing Corporate Criminal Liability’ 75 *Minnesota Law Review* 91; Lawrence Friedman, ‘In Defence of Corporate Criminal Liability’ 23 *Harvard Journal of Law and Public Policy* 27; Grantham (n 26) 172.

²⁹ Clough and Mulhern (n 21) 7–8.

³⁰ *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 [55].

³¹ Law Commission (UK), *Criminal Liability in Regulatory Contexts* (Consultation Paper No 195, 2010) [3.8].

³² G Lamond, ‘What Is a Crime?’ (2007) 27(4) *Oxford Journal of Legal Studies* 609, 629.

³³ See Andrew Ashworth, ‘Is the Criminal Law a Lost Cause?’ (2000) 116 *Law Quarterly Review* 225; Mirko Bagaric, ‘The “Civil-isation” of the Criminal Law’ (2001) 25 *Criminal Law Journal* 10; cf Jeremy Horder, ‘Bureaucratic “Criminal” Law’ in R A Duff et al (eds), *Criminalisation: The Political Morality of the Criminal Law* (Oxford University Press, 2014) 101.

Beyond volume, the Commonwealth Criminal law has been criticised as lacking a “unifying principle”.³⁴ It has been argued that offences should be restricted to conduct that involves “substantial wrongdoing”.³⁵ In the United Kingdom, the Law Commission has proposed that criminalisation of regulatory contravention be restricted to conduct involve “seriously reprehensible conduct”, such that the stigma attaching to criminal conviction is justified.³⁶ Such an approach poses existential questions for a lot of Australian corporate criminal law, given that, at present, failing to put an ACN on certain company documents is a criminal offence so to failing to tell ASIC that the opening hours of your company’s registered office has changed.³⁷ How can these things be genuinely criminal? Is there any moral blameworthiness that could reasonably attached to those failures?

Even if these concerns about the content of the criminal law are resolved, are we still just making the corporation a deodand? Can notions of retribution and denunciation coherently be applied to a corporation, itself?

Yet civil penalties “cannot capture the retributive concerns of criminal liability”.³⁸ And, it seems possible that principles of denunciation could apply to a corporation.³⁹ After all, as a matter of law the corporation is a distinct personality as a legal individual. Corporations make reference to their culture, and unique attributes. For many companies, particularly those operating in sectors that engage with the public, corporate reputation is highly valued. Brands have value on balance sheets.

To be properly criminal, it would seem there also needs to an aim for the offence that goes beyond deterrence.⁴⁰ It has been argued that notions of “expressive retribution” could be applied to corporate criminal responsibility.⁴¹ This is a consequentialist theory of retribution that seeks to reinforce in the community the value of the person or persons wronged by the offending.⁴² As opposed to focussing on the wrongdoer, what is the value to the victim of corporate malfeasance that the corporation is found criminally liable. Lawrence Friedman, writing in the Harvard Journal of Law and Public Policy, has suggested that a corporation is sufficiently individual to be susceptible to this conception of retribution.⁴³

This argument has been criticised. Alschuler has argued that corporate criminal responsibility can only exist as a frankpledge between the company’s directors and officers.⁴⁴ It only exists “to ensure

³⁴ Bagaric (n 36) 192.

³⁵ Ashworth (n 36) 240.

³⁶ Law Commission (UK) (n 34) [1.28].

³⁷ *Corporations Act 2001* s 153.

³⁸ Friedman (n 31) 835.

³⁹ *Ibid* 834.

⁴⁰ *Ibid* 841.

⁴¹ *Ibid* 842–843.

⁴² *Ibid* 843.

⁴³ *Ibid* 846.

⁴⁴ Alschuler (n 7) 1376.

an appropriate level of internal policing”;⁴⁵ otherwise, it is just “deodand mythology”.⁴⁶ This has been put forward as the theoretical justification behind the corporate culture provisions attribution regime in the Commonwealth *Criminal Code*.⁴⁷ The problem for the Alschuler argument is, if it holds true, there is no reason for corporate criminal responsibility at all. Its deterrence and internal monitoring aims could be adequately met by civil penalties. There is a Catch-22, however. If we accept that there should be a category of criminal offending at the top of the enforcement pyramid for “substantial wrongdoing” or “seriously reprehensible conduct” by a corporation then it seems necessary for that responsibility to also encompass notions of retribution and denunciation. Otherwise, it is not distinguishable from civil regulation.

So is this making a company a deodand? If used sparingly and appropriately, perhaps not. As Friedman has noted, retribution can have consequentialist aims of condemnation and denunciation by the community. A corporation is not an animal or an inanimate object that medieval people “attributed intentionality and blame to”.⁴⁸ They are legal entities that have significant tangible impacts on our societies.⁴⁹ Some of those impacts may require denunciation on occasion. At the same time, other conduct may be better addressed through civil incentives to improve corporate compliance coupled with individual liability for directors and officers under the criminal law.

In reality, I conclude by suggesting that criminal liability for corporations may in fact operate as some sort of deodand and some sort of frankpledge. This may be acceptable so long as we are clear about what we are trying to achieve and have evidence to support the approaches we adopt.

⁴⁵ Ibid 1380.

⁴⁶ Ibid.

⁴⁷ Clough and Mulhern (n 21) 6–8.

⁴⁸ Alschuler (n 7) 1361.

⁴⁹ Friedman (n 31) 833.